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IN THE

Supreme Court of the United States

October Term, 1963

No. 658

SEYMOUR R. RAYOR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 8, 1963 affirming a dismissal of a motion for new trial made by the United States District Court of the Southern District of California on January 15, 1963.

Opinion Below.

There is no reported Opinion of the District Court. A copy of the Opinion accompanying the Order on Petition for Rehearing of the United States Court of Appeals for the Ninth Circuit is printed in Appendix "B" hereto.

Jurisdiction.

The Order of the Court of Appeals on Petition for Rehearing was entered on October 8, 1963. On October 25, 1963 Mr. Justice Douglas issued an Order extending the time to file this Petition to December 7, 1963. Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). The United States District Court had jurisdiction under Section 3231, of Title 18 U. S. C.

Questions Presented.

1. Whether a Motion for a New Trial Under Rule 33 of the Federal Rules of Criminal Procedure Is Timely When Filed Within Five Days of Entry of Judgment of the United States District Court but Not Filed Within Five Days of the Verdict of the Jury.

2. Whether the Motion for a New Trial on the Ground of Newly Discovered Evidence Which Was Made Within Two Years After Final Judgment Was Properly Denied.

Statutes and Rules Involved.

The statute involved is §7206(1), Internal Revenue Code of 1954; The Federal Rules of Criminal Procedure are Rules 33, 34, 37(a)(2) and 47. They are printed in Appendix "A" hereto.

Statement.

Motion for New Trial.

On November 14, 1962 a jury brought in a verdict of guilty against Petitioner for violation of §7206(1) of the Internal Revenue Code of 1954.

On December 20, 1962 Petitioner was sentenced by the Court and on that day a written Judgment was

entered. [Tr. 153.] On that same day the Court set January 14, 1963 for the Motion for New Trial.[1] The Court entered the following in the minutes of the Court December 20, 1962. "Court grants motion of counsel for defendant for hearing motion of defendant for new trial and orders that same be heard Jan. 14, 1963 1:30 PM." [Tr. 152.][2]

The Motion for New Trial was made on January 14, 1963. [Tr. 168 and Rep. Tr. 709.] Subsequent to the setting of the Motion for New Trial on December 20, 1962 and ten days before the Motion for New Trial was made on January 14, 1963, that is, on January 4, 1963, Petitioner filed a document designated "Motion for New Trial" in which the reasons for the motion were stated. [Tr. 154.] As previously stated, the Motion for New Trial was made and argued by Petitioner's Counsel and Government Counsel, at 1:30 PM January 14, 1963 which was the date set on December 20, 1962, the date when judgment was entered.

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[1]The following colloquy between petitioner's counsel and the Court occurred on December 20, 1962:

"Mr. Mortenson: We intend to file a motion for new trial. Would January 14th be a satisfactory date for that?

The Court: January 14th is convenient, at 1:30. I know he bond is only $10.00. The bond will be exonerated on payment of the fine.

Mr. Mortenson: Thank you, your Honor.

The Court: That is at 1:30 on January 14th for a motion for new trial, is that right?

Mr. Mortenson: Yes, your Honor.

The Court: Very well." [Rep. Tr. 707.]

[2]On the same date the clerk's docket book bears the following entry:

"12/20/62 . . . ENT. ORD. MOT. New Trial Be Hrd. 1-14-63, 1:30 P.M." Footnote 2—opinion of Court of Appeals below. See also affidavit of Assistant United States Attorney Thomas R. Sheridan attached to Motion to Dismiss Appeal in the Court of Appeals.

Thus, we have the following sequence of events: On December 20, 1962 Petitioner's Counsel said:

> "Mr. Mortenson: We *intend* to file a motion for new trial. Would January 14th be a satisfactory date for that?" [Rep. Tr. 707.] (Emphasis added.)
>
> The Court set ". . . 1:30 on January 14th for a motion for new trial." [Rep. Tr. 707.]

When the Court opened on January 14, 1963 at 1:30 PM it announced the proceeding as a motion for new trial as follows:

> "Los Angeles, California, Monday January 14, 1963. 1:30 PM.
>
> The Court: All right. U. S. A. v. Seymour Rayor. Motion for New Trial." [Rep. Tr. 709.]

On January 15, 1963 the Court dismissed the Motion for New Trial ". . . on the grounds that the said motion was not made within the time as provided in Rule 33 . . ." [Tr. 169.]

Rule 33 of the Federal Rules of Criminal Procedure provides that the Motion for New Trial shall be made ". . . within 5 days after verdict or *finding of guilty or within such time as the Court may fix during the 5-day period.*" (Emphasis supplied.) In *Lott, et al. v. U. S.*, 367 U. S. 421, this Court held under Rule 34 that "the *judgment of conviction and sentence* constituted the 'determination of guilt.'" The Court also made it clear that the decision also applied to Rule 33 which uses the words "finding of guilty" in place of "determination of guilt."

It therefore follows, inescapably, that the motion for new trial was timely filed and should not have been dismissed. To recapitulate: On the same day the Court

entered a written order in which it was stated: *"IT IS ADJUDGED* that the defendant is guilty as charged and convicted." [Tr. 153] the petitioner's counsel stated he intended to file a motion for new trial and the Court set January 14, 1963 at 1:30. On January 14, 1963 at 1:30 the motion for new trial was made. [Tr. 168 and Rep. Tr. 709.] On the following day it was dismissed. [Tr. 169.] The Notice of Appeal was filed on January 24, 1963 [Tr. 182] within ten days of the Order of Dismissal as required by Rule 37(a)(2).[3]

[3]THE FOLLOWING COMPARATIVE TIMES OF MOTIONS IN *LOTT & RAYOR* SHOW THAT THE ISSUES ARE THE SAME:

LOTT, et al. v. U. S.	RAYOR
367 U. S. 421.	Case at Bar.
March 17 & 20, 1959 tendered pleas of *nolo contendere* and accepted by Court (280 F. 2d 24, 26).	November 14, 1962 verdict of jury (guilty).
Three Months Later	Five Weeks Later
June 19, 1959, sentenced by Court.	December 20, 1962 sentenced by Court.
Written judgments entered June 22, 1959.	Written judgment entered December 20, 1962.
Within Five Days (Rules 33 & 34)	Within Five Days (Rules 33 & 34)
Motion in Arrest of Judgment filed June 23, 1959.	Motion for New Trial set on December 20, 1962 for January 14, 1963.
Motion in Arrest of Judgment denied July 13, 1959.	On January 15, 1963 by written Order Court *dismissed* Motion for New Trial after hearing on January 14, 1963.
Within Ten Days (Rule 37(a)(2))	Within Ten Days (Rule 37(a)(2))
Notices of Appeal were filed July 15 and 17, 1959.	Appellant filed Notice of Appeal to this Court January 24, 1963.
Appeal dismissed by Fifth Circuit June 20, 1960. (Cameron, Circuit Judge dissenting.) *Reversed by the Supreme Court, June 12, 1961.*	

The Court of Appeals below not only decided that the *Lott* case did not apply because it dealt with a *nolo contendere* plea, and Rule 34, not Rule 33, but it also decided that the motion for new trial was filed January 4, 1963 and not January 14, 1963. The finding, as demonstrated above, is refuted by the record. Reference to five separate sources supports the fact that the motion for a new trial was set on December 20, 1962 and made on January 14, 1963.

1. On December 20, 1962 Petitioner's Counsel requested that January 14, 1963 be set for the motion. [Rep. Tr. 707.]

2. The minutes of the court show that the motion was to be made January 14, 1963. [Tr. 152.]

3. The Clerk's docket shows the entry "12/20/62 . . . Ent. Ord. Mot. New Trial Be Hrd. 1-14-63, 1:30 P.M."

4. On January 14, 1963 the court said "All right, *U.S.A. v. Seymour*, motion for new trial." [Rep. Tr. 709.]

5. The minute order of the court filed January 14, 1963 shows that the motion for new trial was made that day. [Tr. 168.]

The document entitled "Motion For New Trial", giving reasons for the motion, was filed January 4, 1963, ten days before January 14, 1963 the date the motion was made. The Court of Appeals below states that Rule 45 was not met because, "there is no showing the court permitted it to be made orally, hence it was required to be in writing." As the record shows [Rep. Tr. 709] the court heard oral argument on the motion for new trial. At that time there was in the court

files a written motion for new trial. Could it be possible that this written document, intended to assist the court, which was filed on January 4, 1963 destroyed petitioner's right to his motion set for January 14, 1963? The question answers itself.

Motion for New Trial Based on Newly Discovered Evidence.

After judgment was entered, petitioner's counsel received a telephone call from the Internal Revenue agent who had investigated the case. The agent stated that he was prepared to recommend a refund of taxes which would be evidence that the petitioner had paid taxes on some of the same sales twice, once in the year under prosecution and also in a subsequent year. If it had been known this testimony was available at the time of trial petitioner would have had strong support for his contention that the tax return involved was not fraudulent because the tax on it had been overpaid.

Accordingly, this was given as one of the reasons for granting a new trial based on newly discovered evidence. The Motion for New Trial based on the ground of newly discovered evidence was filed on January 10, 1963 [Tr. 162.] The Court heard argument on this motion on January 14, 1963 at the same time as the Motion for New Trial. The Court denied this motion on the same day. (January 14, 1963.) [Tr. 168.]

There is no question but that this motion and the notice of appeal directed to its denial were timely filed. At the time of the argument the Trial Court recognized that both motions raised the same basic issue. In referring to the Motion for a New Trial and the

Motion for a New Trial on the Ground of Newly Discovered Evidence, the following colloquy occurred:

"The Court: It really raises the same question.

Mr. Mortenson: Yes, it is the same basic issue.

Mr. Mortenson: I want to call the attention of the Court to this particular: If you recall, you let in two checks that were issued in 1956.

The Court: Yes, and I instructed the jury they were only to be considered with respect to the question of intent.

Mr. Mortenson: That is right, your Honor.

Now, I maintain that if the Government is permitted, on any basis, to put in something for 1956, the defendant would be, too, if he knew what it was going to be.

I maintain that there can't be any question but what we are in here on the motion; but I don't seem to be able to convince the Court that the tax has anything to do with it.

The Court: No. I am still going to adhere to that position, Mr. Mortenson. You have a clear-cut question for the appellate department to determine. If the amount of tax for that year is determinative, why, then Mr. Rayor has committed on [no] crime." [Rep. Tr. 717-718.]

In view of the fact that the newly discovered evidence went to one of the crucial issues in the case the trial court should not have denied the motion for new trial and the court of appeals should have reversed its decision.

Reasons for Granting the Writ.

The decision of the Court below in the instant case is directly in conflict with the decision of this Court in *Lott, et al. v. United States*, 367 U. S. 421.

The Court of Appeals in the instant case held that the five days for making a Motion for New Trial ran from the date of jury verdict. This Court said in *Lott v. United States*, 367 U. S. 421, 426:

> ". . . we have concluded that it was the judgment of conviction and sentence, not the tender and acceptance of the pleas of *nolo contendere* that constituted the 'determination of guilt' within the meaning of Rule 34. And, inasmuch as the motions in arrest were 'made within 5 days after (that) determination of guilt,' as required by Rule 34, and thus, in any view, were also 'made within the 10-day period' after entry of the judgment appealed from, as required by Rule 37(a)(2), the appeal, taken 'within the 10 days after entry of the order denying the motion' was timely."

The Court of Appeals in the case at Bar states in its Opinion:

> "There are two reasons the *Lott* case was not controlling. (a) In *Lott*, pleas of *nolo contendere* were involved, and not a jury verdict; (b) in *Lott*, Rule 34 and not Rule 33 was involved. They contain different language."

Neither of these distinctions has any validity as appears from this Court's Opinion in the *Lott* case. After discussing the matter of the *nolo contendere* plea this Court said, 367 U. S. 421, 427:

> "Necessarily, then, it is the judgment of the Court—not the plea—that constitutes the 'deter-

mination of guilt'. Apart from the Opinion below, we have not been cited to any case, and have found none that holds or even intimates the contrary."

Also with regard to the decision of the court of appeals below that *Lott* did not apply because it involved a *nolo* plea this court at page 426 of the opinion after discussing the *nolo contendere* plea said: "It is still up to the court 'to render judgment' thereon."

That is, this court held that the 5 day period ran after judgment and sentence not after the *nolo* plea.

It is clearly indicated that this Court in deciding *Lott v. United States*, 367 U. S. 421, 424, considered Rule 33 in parity with Rule 34. Footnote 8 lists seven cases. These cases involved Rules 33 and 34 as follows:

(Rule 33) *United States v. Bertone*, 249 F. 2d 156 (C. A. 3, 1957); (Rules 33 and 34) *Drazen v. United States*, 198 F. 2d 699 (C. A. 9, 1952); (Rule 33) *O'Neal v. United States*, 264 F. 2d 809 (C. A. 5, 1959); (Rule 34) *Gotsch v. United States*, 185 F. 2d 411 (C. A. 8, 1950); (Rule 33) *Lujan v. United States*, 204 F. 2d 171 (C. A. 10, 1953); (Rule 34) *Sullivan v. United States*, 212 F. 2d 125 (C. A. 10, 1954), aff'd. 348 U. S. 170 (1954), and (Rule 33) *Smith v. United States*, 273 F. 2d 462 (C. A. 10, 1959).

The above cases involving both Rules 33 and 34 were cited as causing ". . . a conflict between the circuits upon the question presented . . ." (at p. 424).

With regard to the fact that the *Lott* case involved Rule 34 and not Rule 33, Mr. Justice Clark in the dissenting opinion said, 367 U. S. 421, 431-432:

> "As was pointed out there, Rule 45(b) specifically provides that 'the Court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal' but the Court has, by today's Opinion, enlarged the time provided in *these Rules*, contrary to their express provision, contrary to our prior cases, and contrary to the long-established practice at the Bar." (Emphasis supplied.)

So, this Court in the *Lott* case applied the same interpretation to Rule 33 that it did to Rule 34. This Court, in referring to the interplay between Rule 37(a)(2) and Rules 33 and 34, said (367 U. S. 421, 425):

> ". . . recognizing, as we do, the obscurity, if not inconsistency, in these Rules that has been exposed by this case, we need not here decide whether Rules 33 and 34 modify Rule (a)(2) so as to limit the time which it specifies for the taking of an appeal—but may and should leave that problem and its kindred ones, brought to the fore in this case, for resolution by the rule-making process."

This Court did not, as the Court of Appeals below indicated, delegate its decision to "the rule-making process" but decided whether the Court of Appeals, in the decision in the *Lott* case below, was right or wrong. The Fifth Circuit in the *Lott* case clearly

recognized the issue it was deciding. In its opinion at page 28 it said:

> "If the pleas of nolo contendere and the acceptance of them were determinations of guilt it follows that the motions in arrest of judgment were filed too late, the time for appeal was not tolled, and the appeals were not taken in time. If, on the other hand there was no determination of guilt, as that phrase is used in Rule 34, until the judgment and sentence, then the motions were timely made and the appeals were timely taken." *(Lott v. United States*, 280 F. 2d 24) (C. A. 5., 1960.)

The Fifth Circuit held that the motions in arrest of judgment were filed too late and this Court reversed, holding that the motions were timely made within five days of the judgment and sentence.

We have the precise issue in the case at Bar. The Court below has held that the five-day period for making the motions runs from the date of the jury verdict and is not timely if filed within five days of sentence and judgment.

If the decision in this case by the Court of Appeals for the Ninth Circuit is allowed to stand, two rules will prevail in the circuits. The rule in the Ninth Circuit will be that a Motion for New Trial filed within five days after entry of judgment is too late. In the other ten circuits the rule under *Lott v. United States, (supra)* will prevail, holding that a Motion for New Trial filed within five days of the entry of judgment is timely. The confusion engendered will per-

meate all appeals in criminal cases and using the words of this Court in *Lott v. United States,* 367 U. S. 421, 425: ". . . such a snare should not be permitted to deprive one of the valuable right of an appeal upon which his liberty, or his life, may well depend."

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: 3rd day of December 1963.

Respectfully submitted.

ERNEST R. MORTENSON,
Attorney for Petitioner.

APPENDIX A.

Rule 33 Federal Rules of Criminal Procedure:

"NEW TRIAL.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

Rule 34 Federal Rules of Criminal Procedure:

"ARREST OF JUDGMENT.

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."

Rule 37(a)(2) Federal Rules of Criminal Procedure:

"TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI.

(a) Taking Appeal to a Court of Appeals.

(2) Time for Taking Appeal.

An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

Rule 47 Federal Rules of Criminal Procedure:

"MOTIONS.

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit."

Section 7206 Internal Revenue Code of 1954:

"FRAUD AND FALSE STATEMENTS.

Any person who—

(1) *Declaration under penalties of perjury*

—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony. . . ."

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Seymour R. Rayor, Appellant, vs. United States of America, Appellee. No. 18,653. Oct. 8, 1963.

Order on Petition For Rehearing.

Before: Barnes, Jertberg and Koelsch, Circuit Judges.

We dismissed appellant's appeal for what we thought obvious reasons. His vigorous petition for rehearing persuades us we should reply in some detail.

Rule 33 of the Federal Rules of Criminal Procedure requires a motion for a new trial based on any other ground than newly discovered evidence to be made within five days after *verdict* or finding of guilty, or within such further time as the court may fix during the five day period.

Rule 34 (to be hereinafter discussed) requires a motion in arrest of judgment to "be made within five days of determination of guilt, or within such further time as the court may fix during the five day period."

It is undisputed that the jury in this case convicted defendant by a verdict rendered on November 14, 1962. On or before November 19, 1962, any motion for a new trial (not on the grounds of newly discovered evidence) was required to be filed, or an application made to the court for an extension beyond that five day period.

There were two motions for a new trial filed in this case. The first was filed on January 4, 1963

(Tr. p. 154) on several grounds, but *not* on grounds of newly discovered evidence.

On January 9, 1963, the government filed its opposition to the motion for new trial, pointing out the then pending motion was not filed on the ground that there was newly discovered evidence, although eight other grounds had been carefully specified. No contention is made here that anything was done before December 20, 1962, the day of sentence.

Lott, et al. v. United States, 367 U.S. 421, is relied upon by appellant as demonstrating "beyond doubt that the same periods under the rules were involved in *Lott* and the instant case." We ruled the *Lott* case was not controlling.

There are two reasons the *Lott* case was not controlling. (a) In *Lott*, pleas of *nolo contendere* were involved, and not a jury verdict. (b) In *Lott*, Rule 34 and not Rule 33 was involved. They contain different language.

We note in the able opinion of Mr. Justice Whittaker in *Lott*, that although the Supreme Court was invited to rule that Rule 37(a)(2) (and *only* 37(a)(2)) controlled all appeals; and that Rules 33 and 34 should be completely disregarded because controlled by Rule 37(a)(2), it declined to do so, leaving "that problem and its kindred ones, brought to the face in this case, for resolution by the rule-making process."

Thus in *Lott*, the Supreme Court "concluded that it was the judgment of conviction and sentence, not the tender and acceptance of the plea of *nolo contendere*, that constituted the 'determination of guilt' within the meaning of Rule 34. . . . The plea itself does not constitute a conviction nor hence a 'determination of guilt.'"

The court noted that at any time before sentence is imposed the plea may be withdrawn and "necessarily then, it is the judgment of the court—not the plea—that constitutes the 'determination of guilt.'"

Of course, after a trial by the court and a finding of guilty, a judge conceivably could change his mind prior to judgment, and set aside the finding of guilt. But this court has already rejected this possibility as a reason for judicially wiping out the plain meaning of Rule 33. *Pugh v. United States*, 9 Cir. 1952, 197 F. 2d 509, 511. Such reasoning we said would make Rule 33 "an absurd superfluity." And we said the court's "finding of guilty" is, in Rule 33, treated "exactly like a verdict of guilty." *Marion v. United States*, 9 Cir. 1948, 171 F. 2d 185, 186, cert. denied 337 U.S. 944.

In the instant case, we deal with Rule 33 alone. Its language differs from Rule 34: it specifically says five days after *verdict* or finding of guilty. The finding of guilt *in a jury case* is made only by a jury's verdict; not by any pronouncement of sentence thereafter. To follow appellant's reasoning, we would be required to read out of Rule 33 the key word—"verdict", and hold it has no meaning. This we cannot do.

The appellant here could not (unlike his counterparts in the *Lott* case) "withdraw" the jury's verdict of guilty. It was the jury which created a finding of guilt, and the reference to "verdict or finding of guilt" obviously is to cover both jury and non-jury cases. In the latter, with no verdict, there is no finding of guilt until the court so rules.

We envision, with the same concern as the dissenting judges in *Lott* display, a fear of "utter confusion"

with the trial courts in a condition of "procedural distraction" if appellate courts continually enlarge the time for appeal, contrary to the express language of the rules.

Whether we like such rules or not, we are bound by them, and *Lott v. United States, supra*, does not set us, nor the appellant in this case, free to follow any rule we please, or prefer to the adopted rules.

Insofar as the original motion for new trial is concerned, there is no question but that it was not timely filed.

But appellant, on January 10, 1963, *before the first motion for new trial had been decided* (and doubtless in recognition of the strength of the government's position), filed a second motion for new trial (Clerk's Trans. p. 162), on the *sole* ground of newly discovered evidence.

Under such circumstances, the second motion comes before the trial court with suspicion as to the appellant's good faith. A careful reading of the very short affidavit filed by appellant (less than one page) indicates (a) vague general allegations of newly discovered evidence;[7] (b) specific reference to the fact appellant had testified at the trial he had paid the tax twice on income from the sale of certain property; that this testimony was stricken by the court; that "since the verdict was returned he had discovered evidence of payment of tax twice. This includes a cancelled check in the amount of $42,157.27 constituting a payment of income tax."

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[7] "That further evidence has been discovered which it is believed would have affected the jury's verdict if it had been known to exist at the time of trial."

The affidavit filed by appellant's counsel was longer; recited the same limited facts as set forth above, and various *conclusions* (1) that "since the return of the jury verdict *affiant* discovered for the first time that he could prove by other evidence that tax had been paid from the sale of said properties twice." No attempt was made to delineate what the other evidence was, or why it could not have been discovered earlier, or what the *one* discovered check would prove, or how it could do so. (2) That in January 1963, appellant discovered other facts which could prove that taxable income was not properly allocated. Again, no attempt was made to specify what the "other facts" were, and how they could prove what counsel concluded they could, or what diligence had been exercised, or why the facts could not have been discovered before.

The affidavit then relates a telephone conversation with a government agent, occurring after the trial, asserting that if affiant had known what the government "contemplated" at the trial, he would have called this government employee as a witness. Leaving for the instant the question of the admissibility of a government investigator's testimony as to what acts the government "contemplated" in the future, no showing of diligence or reasons for lack of investigation or preparation are here attempted.

The court, as we have noted, denied the motion for a new trial on the ground of newly discovered evidence. Under well known rules applying to such motions (see cases past) the action was eminently proper. The trial court later denied the original motion for a new trial, as untimely. Appellant's counsel moved for reconsideration (Clerk's Trans. p. 170). We assume

this was denied, although the Clerk's Transcript brought before us does not show this; except by an indirect reference to such denial "on January 23rd, 1963" contained in a Notice of Appeal (Cl. Tr. p. 183).

On January 16, 1963, appellant filed appeal from the denial of his said (second) motion for new trial (on the ground of newly discovered evidence). (Cl. Tr. pp. 177-178.)

On January 24, 1963, appellant filed an appeal from the later denial of his "said (first) motion for new trial, and from order dismissing defendant's motion for new trial." (Cl. Tr. p. 183.)

For the reasons hereinbefore stated, appellant's first motion for new trial was not timely filed. It was properly denied on that ground, and on the motion to dismiss the appeal therefrom we granted the motion. We decline to change that order, and reaffirm our action.

Appellant's appeal from his *second* motion for a new trial cannot be dismissed on the ground it was not timely filed. It was. (Rule 33, Fed. R. Crim. P.) The judgment in this case was filed December 20, 1962 (Tr. p. 153).

Rule 37(a)(2), discussed above, requires an appeal

> "within ten days after entry of the judgment or order appealed from, but if a motion for new trial . . . has been made within the ten day period, an appeal from a judgment of conviction may be taken within ten days after entry of the order denying the motion."

In this case, no motion for new trial on any ground was made within this ten day period. Thus no appeal from the judgment of conviction lies here.

Appellant apparently recognizes this, and did not purport to appeal from the judgment of December 20, 1962. His *first* notice of appeal is from "the denial of said motion for new trial;" his *second* made on grounds of newly discovered evidence. (Cl. Tr. p. 178.) His *second* notice of appeal is from "the denial of said motion for new trial and from order dismissing defendant's motion for new trial"—his *first*—made on January 4, 1963 on various grounds (Cl. Tr. pp. 182-183).[2]

When a timely motion for new trial is made, it suspends the running of time within which an appeal must be filed from the judgment of conviction. Ten days for appeal then runs from the date the motion is denied. Rule 37(a).

We repeat: The first motion for new trial was not timely. The second was. The second suspended the running of the time for appeal from the judgment of conviction to ten days after the denial of the timely

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[2]Appellant refers in this second notice of appeal to "A motion for new trial made on December 20th, 1962, following sentencing of the defendant." There is no evidence before us such motion was so made. There is evidence that the court, on "12/20/62 . . . Ent. ord. Mot. New Trial be hrd 1-14-63, 1:30 P.M." Thus all parties know a motion for new trial was to be heard on January 14, 1963. An inference might arise that such a motion had been made on December 20, 1962, or that such a motion was to be subsequently made by appellant's counsel, in writing. The latter inference is supported by the filing of such a motion in writing on January 4, 1963 (Cl. Tr. p. 154). No reference was therein made to a previous, or any, oral motion. But more important, such alleged and purported oral motion of December 20, 1962 was in violation of Rule 47. There is no showing the court permitted it to be made orally, hence it was required to be in writing.

motion. The timely motion (second) was denied January 14, 1963. An appeal was taken from *it* on January 16th, 1963. That was timely appeal. But no appeal was taken from the judgment of conviction.

Thus the only matter now before this court is an appeal from the order denying the motion for new trial on the ground of newly discovered evidence, *i.e.*, whether the trial court should have granted such a motion.

Section 8.58 of Federal Civil Practice lays down hornbook law:

> "A party may obtain a new trial to present newly discovered evidence when it appears [1] that the proposed evidence deals with facts existing at the time of trial, [2] that the aggrieved party was excusably ignorant of these facts, [3] that he could not have found these facts by the exercise of reasonable diligence before trial, [4] that the evidence is material and not merely cumulative, and [5] that the evidence would materially change the results of the trial. See: *Lavino v. Jameson* (9th Cir. 1956) 230 F.2d 909; *Washington v. United States* (9th Cir. 1954) 214 F.2d 33; *United States v. Branzen* (9th Cir. 1944) 142 F.2d 232.
>
> Except for a clear abuse of discretion in granting or denying a motion for new trial on this ground, the trial court's order is not grounds for reversal. *James v. Jones* (9th Cir. 1957) 250 F. 2d 454; *Cedar Creek Oil & Gas Co. v. Fidelity Gas Co.* (9th Cir. 1957) 249 F.2d 277 (if a party failed to prove an allegation indispensable to his case, he is not entitled to another opportunity to submit proof on that issue). See *Norwich*

Union Fire Ins. Soc'y v. Glasser (9th Cir. 1955) 224 F.2d 385 (the neglect of counsel in introducing wrong documents cannot be excused); *Aerated Prods. Co. v. Aeration Processes* (S.D. Cal. 1950) 95 F.Supp. 23 (a party cannot obtain a new trial on the ground that his counsel failed to evaluate the evidence properly)."

Clearly, on the record before us, there exists no abuse of discretion.

The motion to dismiss was brought on by the government *after* appellant filed his opening brief. It is before us, as it was when we originally heard the motion.

Ten errors are alleged, all having to do with the conduct of the trial, save one—the eighth. It claims error in dismissing the motion for new trial "made on the date of sentencing."

In the argument in support of appellant's position, there are 24 pages of argument, and but one sentence referring to the alleged eighth error. That reads:

"The Motion for a New Trial was dismissed in direct contravention of the ruling of the Supreme Court in *Lott v. United States*, 81 S.Ct. 1563, 7 A.F.T.R. 2 1591."

We have disagreed and continue to disagree. We will not allow an appeal heard on issues not properly brought before us.

The petition for rehearing is denied.

(Endorsed) Order on Petition for Rehearing Filed Oct. 8, 1963.

Frank H. Schmid, Clerk.